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NO. 79-1733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

W. D. R.

Appellant

VS.

TAYLOR COUNTY CHILD WELFARE UNIT

Appellee

ON APPEAL FROM THE
TEXAS COURT OF CIVIL APPEALS
11TH SUPREME JUDICIAL DISTRICT

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellant submits this, Appellant's brief in opposition to Appellee's Motion to Dismiss or affirm, and would re-emphasize the points she raised in her Jurisdictional Statement.

I. The Texas Statute controlling the involuntary termination of parental rights, Texas Family Code, Section 15.02, is so vague, indefinite, and overbroad as to deny Appellant fundamental due process and equal protection of the law as guaranteed by the United States Constitution.

It is well established that a parent's relationship with his/her children is one of the liberties protected by the United States Constitution. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); May v. Anderson, 345 U.S. 528, (1953). Only a compelling interest can justify a State's interference, if any, with family life, and a statute which intrudes upon the "private realm of family life" is subjected to careful examination. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala, 1976).

In promulgating a statute or standard that regulates the private realm of family life, the State is obligated to prescribe it with "a greater degree of specificity than in other contexts". Smith v. Goguen, 415 U.S. 566, 573 (1974).

Contrary to this basic demand and requirement, the Texas Statute is unconstitutionally vague and indefinite. Subsections (1)(D) and (E), Section 15.02, Texas Family Code, which were the basis of jury findings that terminated Appellant's parental rights, prohibit certain parental behavior, but in vague and indefinite terms which were never construed by Texas courts. Subsection (2) of Section 15.02 provides that "the best interest of the child" must be determined in addition to the grounds enumerated in Subsection (1), but nowhere in the Statute is the term, "best interest", defined or elaborated.

In its Motion to Dismiss or Affirm, Appellee (Taylor County Child Welfare Unit) frankly concedes that this Texas standard "would be impermissibly vague and overbroad as to the controlling standard in a suit to terminate parental rights." (p. 6, Appellee's Motion to Dismiss or Affirm). Appellee hurriedly adds, however, that the "vague and overbroad" standard was narrowed and elaborated by the Texas Supreme Court in Holley v. Adams 544 SW2d 367 (Tex. 1976), so as to meet the due process requirements.

In fact, Holley v. Adams lists things to consider in the determination of the "best interest" of the child, but obviously the list was not meant to define or narrow the "best interest" standard. A close examination of the Holley factors demonstrates that they are not any more specific or less vague than the statutory language of Section 15.02. For example, "the desires of the child" (A) is an empty phrase in case

of a very young child; "the emotional and physical" "needs" and "danger" in (B) and (C) are simply a tautological statement of Subsections (1) (D) and (E); "the programs available...to promote the best interest of the child" (E) is also a circular definition of the "best interest"; and "the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one" (H) is as vague as the "best interest" itself. It is clear, in other words, that the Holley interpretation cannot save the Texas Statute from vagueness, indefiniteness, and overbreadth.

As the Appellee concedes, a Statute cannot stand the constitutional scrutiny, "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Giaccio v.

Pennsylvania, 382 U.S. 399, 402-403 (1966). See p. 8, Appellee's Motion to Dismiss or Affirm. Gelling v. Texas, 343 U.S. 960 (1952) stated that a city ordinance the language of which contained "of such character as to be prejudicial to the best interests of the people of said City" was unconstitutionally "vague and indefinite." Concurring opinion by Justice Frankfurter at 960. Recently, this Court suggested that "the best interests of the child" could be characterized as "vague". Smith v. Organization of Foster Families, 431 U.S. 816, 835, n. 36 (1977). Appellant contends that no criteria are offered by the Texas Statute for assessing the "best interest" of a child.

Indeed, in addition to such federal court cases as Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa, 1975), aff'd 545 F.2d 1137 (8th Cir. 1976) and Roe v. Conn, supra, which invalidated State termination statutes on the grounds

of vagueness and indefiniteness, a few enlightened State Supreme Courts led the path in invalidating their parental right termination Statutes on the grounds of vagueness and indefiniteness. The Arkansas Supreme Court held that the Arkansas termination statute using the term, "a proper home", was "unconstitutionally vague", because it "does not provide sufficient guidelines to meet the due process requirements" of the United States Constitution and the Arkansas Constitution. Davis v. Smith, 583 SW2d 37, 40 (Ark. 1979). Quoting from Roe v. Conn, supra, the Court further stated, "Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their prescription, the Statute is unconstitutionally

vague." Davis v. Smith, supra, at 43-44.

The Nebraska Supreme Court held the state termination statute which adopts the test of "the best interest and welfare of the children," "being vague and lacking in adequate and understandable standards of conduct to which parents should conform so as not to risk the termination of parental rights, violates the due process requirements...and is therefore unconstitutional and void." Linn v. Linn, 286 N.W.2d 765 (Neb. 1980).

These decisions are based upon many of the same authorities and arguments Appellant has provided this Court in her Jurisdictional Statement attacking Section 15.02 of the Texas Family Code. Other States besides Arkansas and Nebraska are also moving toward an effective resolution of vague and impermissible tests in their termination Statutes. For example, the Michigan Statute contains a good faith

attempt to define the term, "best interest of the child." Michigan Comp. Laws Ann. § 722.23 (Supp. 1976).

The trend seems obvious. It is apparently moving toward the direction of invalidating vague and indefinite termination statutes. It is obvious that the Texas termination statute as well as those of other States will be invalidated sooner or later. But, in the meantime, a countless number of parents and children will be subjected to such unconstitutional statutes. It will take a long time to invalidate these State statutes on a State-by-State piecemeal basis. Therefore, it is highly desirable and advisable that the United States Supreme Court halt and correct this unhappy situation by invalidating such State statutes at one stroke.

CONCLUSION

For the reasons stated in the Jurisdictional Statement and in this Brief in opposition, the appeal of the cause should not be decided summarily but should be set for plenary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Dupree, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Willa Dene Roberts, Appellant herein, hereby certify that on the 8 day of August, 1980, the original and forty copies of the foregoing Appellant's Brief in Opposition to Appellee's Motion

To Dismiss or Affirm has been mailed to the Clerk of the United States Supreme Court for inclusion with the papers of said cause, and additionally, three (3) copies of said Brief were mailed to:

Ms. Sharon Johnson
Attorney for Appellee
Assistant District Attorney
Taylor County Courthouse
Abilene, Texas 79602

Hon. Mark White
Attorney General
State Capitol
Austin, Texas 78711

by depositing such copies in the United States Mail, Fort Worth, Texas, with First Class Postage, prepaid, properly addressed to the Post Office Addresses of the said Clerk, U. S. Supreme Court, Sharon Johnson, Attorney of Record for Apoellee, and the Honorable Mark White, Attorney General, State of Texas, at Austin, Texas. All parties required to be served have been served.

DATED this 8 day of August, 1980.

William D. Dupree